

HARVARD LAW SCHOOL

GENDER VIOLENCE PROGRAM



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May 15, 2023

The Honorable Miguel Cardona

The Honorable Catherine Lhamon

Secretary of Education

Assistant Secretary for Civil Rights

U.S. Department of Education

400 Maryland Avenue SW

Washington DC, 20202

Re: Comment from the Harvard Law School Gender Violence Program and students from the Title IX course regarding Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, ED-2022-OCR-0143

Dear Secretary Cardona and Assistant Secretary Catherine Lhamon:

DISCONNECTS BETWEEN THE DEPARTMENT’S PROPOSAL AND THE LIVED EXPERIENCES OF VULNERABLE STUDENTS

Introduction

We appreciate the opportunity to comment on the Department’s proposed rule clarifying the right of transgender, nonbinary, and intersex athletes to participate in athletic teams consistent with their gender identity under Title IX.

We believe the Department correctly determined that categorical bans on transgender youth participation in sports violate the civil right to be free from sex discrimination under Title IX. However, we are concerned that the Department’s proposed regulation does not adequately protect the practical ability of transgender youth to participate in sports. Given the cascade of attacks inflicted on transgender youth by state governments and school administrations around the country, we worry that the proposed rule is susceptible to exploitation from bad-faith actors who wish to eradicate transgender people entirely. A stronger rule that encapsulates the lived experience of transgender, nonbinary, and intersex youth will better serve the communities this regulation seeks to protect.

Before discussing the specifics of the new proposed rule, it is worth pausing to examine the stakes of the issue. Even for those inclined to favor participation by transgender athletes, many see it as insignificant. With bans on gender affirming care and bathroom access happening in states across the country, sports participation may seem to some like a luxury transgender activists cannot afford. However, trans-inclusive sports policies are critical for a few reasons. First, school sports are a part of the educational process that teach students values like teamwork,

sportsmanship, and self-discipline, and transgender students have the same rights to these educational benefits as other students.¹ In addition, it is important to the mental health of young transgender people to be affirmed in their gender. Social affirmation of transgender youth is linked to lower rates of depression and suicidality.² When a transgender girl is told she cannot play on the girls' soccer team, she is essentially told she is not a "real" girl and may suffer affiliated mental health consequences. By contrast, transgender youth who participate in school sports have higher rates of self-esteem and belonging in their school communities and lower rates of depression.³ Even for those transgender youths who do not play sports, the presence of inclusive school sports policies tracks with lower suicide rates.⁴

Further, sports participation has a broad social weight. Sports are a fundamental part of America, woven into the fabric of our society.⁵ For the valid concerns about the inadequate funding of America's women's sports compared to men's, women's sports still produce role models that inspire young women. Girls across America can watch Serena Williams or Megan Rapinoe on television and know that they are valued members of society. These stars also give young girls people to strive to emulate. If transgender people are excluded from sports, they will not have the opportunity to emulate their role models and may not find transgender role models at all.

¹ See Statement by Chris Erchull, Att'y, GLBTQ Legal Advoc. & Defs., & Sean McDonough, Student Att'y, Harv. L. Sch. LGBTQ+ Advoc. Clinic, representing Seacoast Outright, before the N.H. House Health, Hum. Servs. & Elderly Affs. Comm., in Opposition to House Bill 619, at 3 (Mar. 7, 2023), https://www.glad.org/wp-content/uploads/2023/01/20230307_NH-HB-619-Testimony_GLAD-HLS-Seacoast-Outright.pdf.

² Stephen Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 504 (2018).

³ SHOSHANA K. GOLDBERG, FAIR PLAY: THE IMPORTANCE OF SPORTS PARTICIPATION FOR TRANSGENDER YOUTH 21, CTR. FOR AM. PROGRESS (Feb. 2021), <https://www.americanprogress.org/wp-content/uploads/sites/2/2021/02/Fair-Play-correction2.pdf>.

⁴ *Id.* at 22.

⁵ See EILEEN McDONAGH & LAURA PAPPANO, *What's the Problem?*, in PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 1, 1–2 (2009); Erchull & McDonough, *supra* note 1, at 3.

I. The Proposal's Shortcomings

While the administration's proposal does represent progress, it falls short where it fails to consider the actual experiences of vulnerable youth. In practice, this proposal would concentrate harm on already-marginalized groups: transgender youth with unsupportive parents, transgender youth from poor families, nonbinary and intersex youth, and Black girls.

A. *Overlooking the Barriers to Transition*

One of the faces at the front of the modern push for inclusion of transgender student-athletes is Becky Pepper-Jackson. Becky is a transgender middle school girl from West Virginia.⁶ Becky began socially transitioning to living as a girl when she was in third grade, with the full support of her family.⁷ She was diagnosed with gender dysphoria and began puberty-delaying treatment while she was in elementary school, preventing her from ever undergoing testosterone-driven puberty.⁸ Still, under West Virginia's H.B. 3293, Becky, along with any other transgender students in West Virginia schools, was not allowed to participate in school sports consistent with her gender.⁹ Represented by a team of attorneys from the ACLU, Lambda Legal, and Cooley LLP, Becky and her mother sued the West Virginia State Board of Education to allow Becky to join her middle school's track and cross country teams.¹⁰ Under a preliminary injunction from the Fourth Circuit, Becky is currently allowed to participate while her suit is pending.¹¹

The Biden administration's proposed rule would be great for Becky. Because she started puberty delaying treatment before puberty, she never underwent testosterone-driven puberty.

⁶ First Amended Complaint at 2, *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. July 21, 2021) (No. 2:21-cv-00316).

⁷ *Id.* at 8.

⁸ *Id.*

⁹ *Id.* at 1–2; *see* W. Va. Code § 18-2-25d (2022).

¹⁰ First Amended Complaint, *supra* note 6, at 25.

¹¹ *B.P.J. v. W. Va. State Bd. of Educ.*, 2023 WL 2803113 (4th Cir. Feb. 22, 2023).

Testosterone-driven puberty is the first point at which boys tend to become, on average, more muscular than girls.¹² Under any reasonable interpretation of the proposal, Becky cannot be excluded from girls' sports teams. Her body is developing with no hormonal advantages in size, strength, or speed compared to her cisgender girl peers and there is no justification – based in competitive balance, injury risk, or anything else the rule would consider permissible – that would allow West Virginia to exclude her.

The familial and legal support Becky received throughout this process is extraordinary. Becky's fight against adults trying to exclude her is inspiring, and I do not mention her support to downplay her courage or her accomplishments. However, most transgender girls do not have the opportunity to avoid testosterone-induced puberty entirely, and under the Biden administration's proposal, these girls would be much more vulnerable to exclusion.

In every state, minors need parental consent before receiving medical care related to a gender transition, including puberty suppressants or hormone replacement therapy (HRT).¹³ Many transgender youths do not have parents who accept and support their identity. One survey found that a third of parents say they would not be comfortable with a transgender child.¹⁴ These parents are unlikely to let their children start HRT. Even those who feel “comfortable” with their transgender child may want to delay treatment until the parents are certain it is the right decision. Whatever the motivation for the parents, in practice, a lack of parental consent prevents many

¹² Taline Costa et al., *Influence of Biological Maturity on the Muscular Strength of Young Male and Female Swimmers*, 78 J. HUM. KINETICS 67, 75 (2021).

¹³ Renuka Rayasam, *The Transgender Care that States Are Banning, Explained*, POLITICO (Mar. 25, 2022, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2022/03/25/the-transgender-care-that-states-are-banning-explained-00020580>. HRT is the process through which transgender people bring their hormones and many physical characteristics in line with their gender identity. This typically involves taking testosterone for transgender boys or estrogen and an anti-androgen for transgender girls.

¹⁴ MORNING CONSULT & THE TREVOR PROJECT, U.S. ADULTS' PERSONAL KNOWLEDGE AND COMFORT WITH LGBTQ IDENTITIES 13 (Mar. 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/03/Embargoed-MC-Polling-Data_3.31.22.pdf.

transgender youths from accessing gender affirming care. One doctor who provides gender affirming care described “lots of patients who make an appointment the week of their 18th birthday because they are sitting at home, identify as trans and have dysphoria,” but have been unable to get a parent to sign off on their treatment.¹⁵

Even with parental approval, gender affirming care is healthcare, and it is accordingly susceptible to the affordability issues that permeate the American healthcare system. Puberty suppressants can be a particular challenge for many parents to afford, given their average annual total cost of \$2,623.¹⁶ For transgender youths who are old enough and prepared to start HRT, it is less expensive, averaging \$161 annually for testosterone and \$248 annually for estrogen and an anti-androgen, but the diagnoses and referrals necessary to receive treatment can be an additional cost burden.¹⁷ These affordability concerns are exacerbated by many insurance companies’ refusal to cover treatments for gender dysphoria.¹⁸ Ultimately, in a country where 74% of residents live paycheck to paycheck and only a third could afford an emergency \$400 expense without taking on debt, the costs of gender affirming care are prohibitive for many transgender youths and their families.¹⁹

A recent issue making gender affirming care even less accessible to transgender youth is the trend of states prohibiting minors from receiving treatment related to a gender transition.¹⁷

¹⁵ Rayasam, *supra* note 13.

¹⁶ Kellan Baker & Arjee Restar, *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, 50 J.L. MED. & ETHICS 456, 463 (2022).

¹⁷ *Id.*

¹⁸ See Jo Yurcaba, *Transgender People Report Years of Battles for Health Insurance Coverage*, NBC NEWS (Sept. 22, 2021, 4:30 AM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/transgender-people-report-years-battles-health-insurance-coverage-rcna2145>.

¹⁹ Tanya Hayre Gillogley, Survey, *Americans Personal Savings Are Plummeting as 74% Are Now Living Paycheck to Paycheck*, SECURESAVE (Jan. 25, 2023), <https://www.prweb.com/releases/2023/01/prweb19128966.htm>.

states currently have a law or policy banning minors from transitioning.²⁰ There are strong arguments against the constitutionality of such policies, and three states are currently enjoined from enforcing them, but bans are also being considered in an additional 16 states.²¹ Even if they are ultimately struck down, these policies have interrupted or delayed the transitions of countless transgender youths across America.

Between unsupportive parents, expensive treatments, and harmful state policies, it is difficult for many transgender young people to transition at all, and especially difficult to transition early enough to avoid undergoing the wrong puberty. By allowing states to use the goal of competitive fairness to distinguish between transgender student-athletes based on the timing or status of their medical transition, the Biden administration is leaving open the possibility of additional discrimination against vulnerable young people already facing obstacles.

B. Susceptibility to Invasive and Discriminatory Enforcement

There are also serious concerns about the enforcement mechanisms for rules excluding transgender students from sports. Any policy other than allowing students to self-identify their gender will necessarily require a process to verify the sex of children. The administration's proposal acknowledges this reality, noting only that "[c]riteria requiring physical examinations or medical testing or treatment related to a student's sex characteristics" must comply with the proposal's general requirements.²² States' suggestions for that verification process are predictably invasive: Ohio weighed requiring examinations of girls' "internal and external reproductive

²⁰ *Attacks on Gender Affirming Care by State*, HUMAN RIGHTS CAMPAIGN (last updated May 15, 2023), <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map>.

²¹ *Id.*

²² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860, 22,871 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).

anatomy” and Florida wanted to make girls talk about their menstrual history.²³ This obsession with young girls’ reproductive anatomy is deeply concerning and promises to drive girls out of sports, cisgender and transgender alike.²⁴

There is also every reason to believe these invasive sex verification requirements would be discriminatorily applied. Women of color, and especially Black women, are regularly framed as insufficiently feminine. Serena Williams is perhaps the most famous example. Throughout her career as a Black woman dominating the women’s tennis world, Serena was frequently dogged by unfounded rumors that she was transgender.²⁵ In 2014, the head of the Russian Tennis Federation was fined and suspended for referring to Serena and her sister, Venus, as the “Williams brothers” and saying looking at them was “scary.”²⁶ One can only imagine the lengths to which parents of opposing athletes would have gone to “verify” Serena’s gender if she grew up in the current wave of anti-transgender hysteria. This is not purely hypothetical for today’s successful young athletes – a girl in Utah had her gender investigated by the Utah High School Activities Association after two parents complained about her beating their daughters “by a wide margin.”²⁷ By permitting the continued exclusion of some transgender youths from school sports, the Biden administration is reinforcing a world in which every young athlete’s gender is up for debate by any nearby adult.

²³ Anna Staver, *Fact Check: Ohio Bill Banning Transgender Girls from Female Sports Could Require Genital Checks*, COLUMBUS DISPATCH (June 7, 2022, 10:00 PM), <https://www.dispatch.com/story/news/2022/06/07/bill-transgender-athletes-could-require-genital-checks-girls/7529718001/>; Anisha Kohli, *Florida May Force High School Athletes to Disclose Their Menstrual History*, TIME (Feb. 1, 2023, 5:39 PM), <https://time.com/6252147/florida-student-athletes-menstrual-history/>.

²⁴ See GOLDBERG, *supra* note 3, at 14–15 (noting a decrease in girls’ participation in school sports in states with trans-exclusionary policies, compared to no change in participation rates in states with trans-inclusive policies).

²⁵ Lydia Slater, *Queen Serena: The Power and the Glory*, HARPER’S BAZAAR (May 30, 2018), <https://www.harpersbazaar.com/uk/fashion/fashion-news/a20961002/serena-williams-july-issue-cover-shoot/>.

²⁶ *Id.*

²⁷ Paul Blest, *Parents Demanded School Check the Gender of Girl Who Beat Their Kids in Sports*, VICE NEWS (Aug. 18, 2022, 2:29 PM), <https://www.vice.com/en/article/pkgaj8/utah-parents-gender-check-anti-trans-sports>. Due to privacy concerns for the student involved, no additional details regarding this situation are publicly available, including the student’s race.

C. *Ambiguities Risk Harm to Poor Families, Nonbinary and Intersex Students*

One key point LGBTQ+ rights organizations make in support of the administration's proposal is that it would restrict schools' opportunities to exclude transgender students if "[p]roperly interpreted and applied."²⁸ Unfortunately, these LGBTQ+ organizations are not responsible for developing new policies based on the proposal. That task, in many cases, instead falls to the same states that have already passed blanket bans on participation by transgender youth.²⁹ By enacting participation bans, these states have already shown their preferred policies. Many of them have also adopted or considered a host of other anti-transgender policies.³⁰ While they may tweak their sports policies to nominally comply with the administration's proposed rule, in practice, whatever policies they develop will be used to exclude most young transgender people.

As-applied legal challenges to exclusion of transgender students under the proposed rule would likely be successful in many instances. Under most circumstances, advocates for transgender youth could persuasively argue that excluding their client is not necessary to preserve the safety or competitive balance of a sport, especially because the proposal would require minimizing harm to potentially excluded students. However, this is only helpful when students have someone to advocate for them. Enlisting the services of advocacy organizations, as Becky Pepper-Jackson was able to do, is very rare. These organizations are already stretched too thin in their broader fight against anti-LGBTQ+ policies. The other option for excluded

²⁸ NCTE, NWLC, GLSEN, HRC, GLAD, ATHLETE ALLY, PFLAG & NCLR, FACT SHEET: THE DEPARTMENT OF EDUCATION'S PROPOSED TITLE IX RULES (Apr. 2023), <https://pflag.org/wp-content/uploads/2023/04/Athletic-NPRM-FS-4.14.23.pdf>.

²⁹ See Movement Advancement Project, *Equality Maps: Bans on Transgender Youth Participation in Sports*, https://www.mapresearch.org/equality-maps/youth/sports_participation_bans (last visited May 15, 2023).

³⁰ See Movement Advancement Project, *Equality Maps: Snapshot: LGBTQ Equality by State*, <https://www.lgbtmap.org/equality-maps/equality-maps>, (last visited May 15, 2023).

transgender students is to find a private lawyer, but these lawyers tend to be expensive and not particularly familiar with or sensitive to the issues transgender people face. Under the administration's proposed rule, then, some transgender students from poor or working-class families will be excluded under impermissibly restrictive policies purely because they cannot find someone to help them challenge those policies.

This is not an inevitable consequence of federal policy that conflicts with the wishes of a local majority. It is instead a consequence of a policy that refuses to draw bright lines. If the administration's rule was instead that, in high school and below, athletes can self-identify their gender for sports participation, enactment for this age range would be simple. If a state or district did not allow a transgender athlete to participate, the violation would be clear and easy to prove. However, the current proposal gives municipalities much more leeway, and this leeway will be used in many instances to exclude transgender students.

The proposal is also wholly inadequate in addressing the needs of nonbinary and intersex students. It discusses both together, briefly, and essentially says that they should be treated consistent with the proposal's requirements. This offers little guidance on actual policy but leaves open the possibility of mistreatment or exclusion of students whose bodies do not fit neatly into a gender binary. One famous example of this is Caster Semenya, a South African runner.³¹ Caster is a cisgender intersex woman, meaning she was assigned female at birth and has always identified as a woman, but has some developmental differences from most cisgender women, including elevated testosterone levels.³² The World Athletics Council's current rules require women with elevated testosterone levels to undergo hormone-suppressing treatment

³¹ Eddie Pells, *Track Bans Transgender Athletes, Tightens Rules for Semenya*, AP NEWS (Mar. 23, 2023), <https://apnews.com/article/transgender-track-semenya-f3499b00b932948f96838adb3b010f11>.

³² *Id.*

(without any medical necessity) to participate in track events.³³ This requirement of hormone suppression without medical justification is inappropriate in any context, but would be especially egregious if applied to children. Still, under the Biden administration's proposal, a school could argue competitive fairness requires them to ensure girls with elevated testosterone cannot participate with other girls.

The administration's note on the importance of competitive fairness in high school athletics exacerbates this issue.³⁴ With this note, they indicated that it would be permissible under the rule to exclude transgender students from high school sports to maintain competitive fairness. In my view, this assigns far too much value to competitive fairness in high school sports. Most high school students who play sports are looking to get exercise, try new things, hang out with their friends, and have fun. Participation by transgender students does not interfere with any of those objectives. There are some who view high school sports as a steppingstone to collegiate sports, but this is a clear minority – 93% of high school athletes do not play their sport in college.³⁵ Of those that do play in college, most are in lower levels, as only 2% of high school athletes make a NCAA Division I roster.³⁶ Some of these few students might be deeply concerned about perfect competitive balance in their high school sports, but even if so, it is unreasonable to prioritize their desire for an ideal playing field over a transgender student's right to even be included.

³³ *Id.*

³⁴ See Sex-Related Eligibility Criteria for Male and Female Athletic Teams, *supra* note 22, at 22,872.

³⁵ Patrick O'Rourke, *Varsity Odds*, SCHOLARSHIP STATS, <https://scholarshipstats.com/varsityodds> (last visited May 15, 2023).

³⁶ *Id.* Division I is the highest level of collegiate athletics. Nearly all economic benefits of college athletics for athletes are concentrated in Division I, as Division I athletes are eligible for full athletic scholarships and are more marketable for endorsement payments based on their name, image, and likeness. See Jackson Nimesheim, *Playing a Sport in Each NCAA Division: What to Know*, USNWR (June 30, 2022, 12:21 PM), <https://www.usnews.com/education/articles/playing-a-sport-in-each-ncaa-division-what-to-know>; Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?*, NBC N.Y. (July 7, 2022, 3:13 PM), <https://www.nbcnewyork.com/news/sports/one-year-of-nil-how-much-have-athletes-made/3765040/>.

II. An Alternative Proposal

For all the aforementioned reasons, any policy other than inclusion of transgender athletes is inappropriate in high school and below. President Biden should follow the lead of the many states continuing to stand with transgender students and recommend full inclusion of transgender students for K-12 school sports.

College sports present some additional dimensions. Competition is more important in college than high school, with student-athletes committing far more time and, at higher levels, with the possibility of meaningful financial benefits from success.³⁷ For college sports, then, the administration should support a return to the framework used by the NCAA for over a decade. Under former NCAA rules, from 2010 to 2022, transgender women were permitted to participate in women's sports following one year of HRT.³⁸ Transgender men were allowed to participate on men's teams without restriction.³⁹ Using this framework, beginning in college, would allow schools to support their transgender students and would solve many of the problems the Biden proposal presented in the high school context.⁴⁰

One of the most concerning aspects of the administration's proposal is that students who cannot access HRT could be excluded from high school sports. In college, though, with school support, nearly every student-athlete who wants HRT should be able to access it. Virtually all college students are at least 18 years old, which negates restrictions based on lack of parental

³⁷ See Nimesheim, *supra* note 36; Hunzinger, *supra* note 36.

³⁸ NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (adopted Apr. 2010), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

³⁹ *Id.*

⁴⁰ While I largely endorse the NCAA's 2010 policy, if it were readopted, I would prefer that HRT requirements only apply to sports where the size, strength, and speed that testosterone confers are affiliated with success in that sport.

consent or states' bans on gender affirming care for minors.⁴¹ Colleges are also well-positioned to facilitate access to gender affirming care. The NCAA already mandates that every student athlete has health insurance, and most receive that insurance from their schools.⁴² An easy solution to access issues, then, is to require schools to include their transgender student-athletes' HRT as part of their insurance coverage.⁴³

The NCAA's "redshirt" system would minimize harm to transgender women required to use HRT for a year before competing. Many first-year college athletes redshirt, meaning they practice with their new team for the year and can keep their scholarships but do not participate in competitions, which allows them to maintain the year of eligibility for future collegiate competition.⁴⁴ Transgender women starting HRT in their first year of college could redshirt, which would give them a year to be part of the team and adjust to their new situation before competing. Done right, the combination of redshirting and beginning HRT would provide a perfect opportunity for schools to support their students in their transitions.

Putting the onus of providing HRT on schools and using a time-based threshold instead of a testosterone level-based threshold would also ameliorate many concerns around invasive

⁴¹ Unlike other state-level restrictions on gender affirming care, which tend to ban care for minors but permit it for adults, Missouri has used its state consumer protection laws to effectively ban gender affirming care entirely. Sarah Fentem, *Emergency Rules Limiting Transgender Care in Missouri Set to Take Effect this Month*, ST. LOUIS PUB. RADIO (Apr. 13, 2023, 3:50 PM), <https://news.stlpublicradio.org/government-politics-issues/2023-04-13/emergency-rules-limiting-transgender-care-in-missouri-set-to-take-effect-this-month>. While this disastrous policy is in effect, it would not be appropriate to enforce any HRT-related restrictions on participation by transgender athletes in Missouri.

⁴² David Leon Moore, *Insurance by Almost Every School Covers Injuries Like Ware's*, USA TODAY SPORTS (Apr. 2, 2013, 8:15 PM), <https://www.usatoday.com/story/sports/ncaab/2013/04/02/injuries-like-kevin-ware-covered-by-almost-every-division-i-school/2047939/>.

⁴³ This requirement would be consistent with Title IX and the Affordable Care Act's restrictions on sex-based discrimination in educational and healthcare facilities. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,560 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106); Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,828 (proposed Aug. 4, 2022) (to be codified at 42 C.F.R. pts. 438, 440, 457, 460 & 45 C.F.R. pts. 80, 84, 86, 91, 92, 147, 155, 156).

⁴⁴ See Ross Dellenger, *The NCAA's Redshirt Rule Change Is a Major Win for Both Coaches and Players*, SPORTS ILLUSTRATED (June 13, 2018), <https://www.si.com/college/2018/06/13/ncaa-redshirt-rule-change-eligibility-reaction>.

enforcement. Schools would have access to their student-athletes' treatment information and, if there was a dispute over sex-based eligibility, all a school would need to do to resolve the dispute is check the student-athlete's treatment records. There would be no need for any additional testing or even asking additional questions of the student-athlete. This less invasive process would also diminish the value of sex verification as a tool for vindictive parents to harass other competitors.

Intersex and nonbinary students can also fit easily into this framework. Nonbinary students would simply be required to follow the hormone-related guidelines based on their birth sex. A nonbinary person who was assigned male at birth would be allowed to participate on men's teams under any circumstances and on women's teams if they have taken feminizing HRT for at least a year. A nonbinary person who was assigned female at birth would be allowed to participate on men's teams under any circumstances and on women's teams if they do not take masculinizing HRT. Intersex people would be allowed to participate based on self-identification of their gender. They should not be punished or excluded because the natural development of their bodies does not conform to binary societal expectations.

Some say allowing transgender women who have undergone testosterone-induced puberty to compete with cisgender women is unfair. World Athletics has banned transgender women who started their natural testosterone-induced puberty from international competitions, arguing "there is insufficient evidence to prove that the male advantage of male-to-female transgender athletes can be removed."⁴⁵ This statement does capture one important fact: at this point, the science around how transgender women's athletic abilities change through transition is

⁴⁵ Rodrigo Pérez Ortega, *World Athletics Banned Transgender Women from Competing. Does Science Support the Rule?*, SCIENCE (Apr. 4, 2023, 5:50 PM), [https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule#:~:text=World%20Athletics%20\(WA\)%2C%20the,took%20effect%20on%2031%20March](https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule#:~:text=World%20Athletics%20(WA)%2C%20the,took%20effect%20on%2031%20March).

underdeveloped. We do not fully know the extent to which transgender women who have undergone testosterone-driven puberty retain the effects of that puberty.⁴⁶ We do know that feminizing HRT can cause decreased strength and muscle mass, increased body fat, and even decreased height.⁴⁷ We also know that testosterone-driven puberty is not desirable for transgender girls. If a transgender girl undergoes this puberty, it is almost certainly because she did not yet realize she was transgender or she was, for any number of reasons outside of her control, unable to access puberty blockers and HRT. Transgender girls and women do not delay gender affirming care and undergo changes that exacerbate gender dysphoria lightly, and they certainly do not do so to *potentially* have a small advantage in women's sports. This policy of excluding based on previous inability to access medical care is unreasonable and has no place in American scholastic athletics.

Separately, some may argue that limiting and testing testosterone levels of women athletes is preferable to using a timing-based HRT metric because it gives a more precise picture of the state of an individual's transition. However, this approach has some important flaws. Firstly, it sets up invasive testing and the mistreatment of intersex people, as happened to Caster Semenya.⁴⁸ In addition, it does more to provide a veneer of scientific legitimacy than actual perfect competitive fairness. It is true that transgender women may retain some physical advantages after a year of HRT, but this might still be true if they reach some arbitrary level of circulating testosterone.⁴⁹ As the World Athletics spokesperson indicated, we do not yet have all the science on how transgender women's bodies develop, but our response to that uncertainty

⁴⁶ *Id.*

⁴⁷ Maddie Deutsch, *Information on Estrogen Hormone Therapy*, UCSF TRANSGENDER CARE (July 2020), <https://transcare.ucsf.edu/article/information-estrogen-hormone-therapy>.

⁴⁸ See Pells, *supra* note 31.

⁴⁹ Timothy Roberts, Joshua Smalley & Dale Ahrendt, *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRITISH J. SPORTS MED. 557, 560 (2021).

should begin with compassion and inclusion of the diversity of human experiences, not surveillance and exclusion.

Finally, a note on injuries. Opponents of inclusion of transgender athletes often argue that including transgender girls in girls' sports will increase injury risks to cisgender girls.⁵⁰ But these opponents also say they do not want to exclude transgender students fully, they just want them to play on the "right" team.⁵¹ When they get their wish and transgender athletes are required to play based on birth sex instead of gender identity, the results are absurd. Mack Beggs was a transgender high schooler in Texas who wanted to wrestle against other boys, but he was required by trans-exclusionary policies to compete with girls instead.⁵² Mack, a transgender boy who had already started HRT, won the girls' state wrestling championship.⁵³ There were no reported injuries, but there is no logical reason why Mack and other transgender boys participating with girls is viewed as any less of an injury risk than transgender girls participating with girls. After high school, Mack went on to have a successful men's collegiate wrestling career.⁵⁴

Conclusion

⁵⁰ See Paulina Dedaj, *High School Volleyball Player Says She Suffered Concussion After Being Injured by Trans Athlete, Calls for Ban*, FOX NEWS (Apr. 21, 2023), <https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban>. When I was a 5'8" high school volleyball player in my first year playing the sport, in an incident functionally identical to that described in the article, I was concussed by a hit from a 6'4" senior who played collegiately the next year. Both of us were male. Accordingly, I would submit that injuries, including injuries resulting from differences in size or skill, are a natural risk of sports, and it is disingenuous to raise them only in the context of inclusion of transgender students.

⁵¹ See David Gortler, *Allowing Biological Males in Women's Sports is Scientifically Unsound*, NEWSWEEK (Oct. 6, 2022, 6:30 AM), <https://www.newsweek.com/allowing-biological-males-womens-sports-scientifically-unsound-opinion-1748900> (arguing sports should be divided purely into "biological male and biological female" divisions).

⁵² Kent Babb, *Transgender Wrestler Mack Beggs Identifies as a Male. He Just Won the Texas State Girls' Title*, TEX. TRIB. (Feb. 26, 2017, 12:00 PM), <https://www.texastribune.org/2017/02/26/transgender-wrestler-mack-beggs-identifies-male-he-just-won-texas-stat/>.

⁵³ *Id.*

⁵⁴ Natalie Esparza, *Faces of Life: Mack Beggs*, LIVING LIFE (Feb. 2020), <https://living.life.edu/faces-of-life/mack-beggs/>.

Title IX's overarching purpose is to allow all students full access to the educational opportunities their schools have to offer, regardless of sex. The Biden administration's proposal may have begun with this purpose in mind, but it would fail to protect access for vulnerable students. By inadequately considering the many barriers to gender affirming care, it would permit the competition-based exclusion of many transgender young people solely because they are unable to access necessary healthcare. Its approved methods of determining sex-based eligibility and lack of clear, bright line rules would force Black girls, intersex people, and transgender students from poor or unsupportive families to bear the brunt of invasive and exclusionary state policies. Instead, the administration should support full inclusion of transgender athletes through high school and a return to the NCAA's 2010 framework for college athletes.